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May 24, 2006

Hon. Jane Harman
Ranking Member
Permanent Select Committee on Intelligence
H-405, The Capitol
Washington, D.C. 20515

Dear Ranking Member Harman:

I am writing in reference to the House Permanent Select Committee on Intelligence's May 26, 2006 Hearing on the Media's Role and Responsibilities in Leaks of Classified Information. Please find enclosed a statement for your consideration and possible inclusion in the record.

Very truly yours,


Mary-Rose Papandrea

STATEMENT FOR THE RECORD

Mary-Rose Papandrea
Assistant Professor, Boston College Law School

House Permanent Select Committee on Intelligence
Hearing on the Media's Role and Responsibilities
in Leaks of Classified Information

May 26, 2006

I am an assistant professor at Boston College Law School, where I teach courses in constitutional law, media law, and civil liberties and national security. Before I became a professor, I represented numerous major media companies in First Amendment litigation. I also served as a law clerk for Hon. Douglas H. Ginsburg of the U.S. Court of Appeals for the District of Columbia Circuit as well as for Hon. David H. Souter of the Supreme Court of the United States. I have authored *Under Attack: The Public's Right to Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35 (2005) and *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. __ (2007) (forthcoming).

Throughout our nation's history, Congress, the press, and the public have battled against the Executive branch's tendency to engage in excessive secrecy. After all, it is natural for the Executive to suppress damaging news and to highlight favorable news in an often deliberate effort to skew public debate and the public's perception of its performance. Since the founding of our Republic, it has been clear that the public cannot depend solely on official government statements to keep it informed about what its government is doing. The Freedom of Information Act and various statutes protecting whistleblowers are two means by which Congress has attempted to counteract the Executive branch's natural secretive tendencies. Although both types of legislation have gone a long way towards promoting an open government, they do not offer a perfect counterbalance to the Executive's efforts to control the dissemination of information. Leaks of classified information to the press have become an integral part of an admittedly imperfect system of creating an informed public, which is essential for a well-functioning democracy.

Before deciding to punish the press for publishing classified information, it is essential to keep in mind who is leaking classified information to the press. Former Executive branch officials have admitted that they selectively released classified information in a conscious effort to generate public support for certain policies or to serve some other bureaucratic or personal agenda. It is inappropriate in such circumstances to punish the press for publishing the contents of these

leaks, especially since the government has unquestioned authority to punish the leakers themselves.

In addition, those seeking to punish the press for publishing classified information should keep in mind that overclassification has become an epidemic, and in many cases information is classified not to protect any real national security interests, but to protect the government from embarrassment or harsh scrutiny. As former Solicitor General of the United States Erwin Griswold, who argued on behalf of the United States in the *Pentagon Papers* case, once said, "It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but with governmental embarrassment of one sort or another." Indeed, Griswold admitted several years after the case was decided that the publication of the *Pentagon Papers* never actually posed a national security threat.

Some charge journalists with ignoring the national security implications of publishing classified information, but this accusation has no foundation. Indeed, the press has exercised remarkable self-restraint by routinely considering the ramifications of their publications and frequently holding stories or limiting their scope in order to soften their impact.

Some of the most recent stories revealing questionable if not illegal government activities were published only after the most thorough consideration of the national security implications, often in consultation with government officials. For example, *The New York Times* held its story about the National Security Agency's warrantless surveillance program for over a year based on arguments from officials in the Bush Administration that publishing the article would cause grave national security harm. It was only after extensive additional reporting that the newspaper realized that publishing the story would not provide useful information to terrorists who were the targets of the program. To date there has been no credible explanation of how *The New York Times'* decision to publish harmed the government's counterterrorism efforts.

Similarly, *The Washington Post* published an article revealing the existence of "black sites" where terrorism suspects were secretly detained and interrogated, but at the insistence of Bush administration officials, the paper did not identify the names of the Eastern European countries that were participating in the program. *The Washington Post* explained that it had accepted the government's argument that revealing the identities of those countries "might disrupt counterterrorism efforts in those countries and elsewhere and could make them targets of possible terrorist retaliation." Like the publication of the NSA wiretapping story, *The Washington Post's* black site revelations may have caused the United States some

embarrassment in international circles, but there is no reason to believe that it has undermined its counterterrorism efforts.

This kind of cooperation and communication between the press and Bush administration officials is remarkable, but it is not unprecedented. In 1961, President Kennedy addressed the American Newspapers Publishers Association and asked that during the Cold War the press exercise extra caution before publishing information that might bear on national security. Emphasizing that he would never tolerate censorship, Kennedy offered to open the communication channels between his administration and the press in order to promote more thoughtful and informed publication decisions. Eighteen months later, Kennedy's promise of open communication was put to the test. *The New York Times* had received information that the Soviet Union had stationed nuclear weapons in Cuba, but it delayed publishing this information after President Kennedy explained to the newspaper's editors that he would be addressing the nation the following day and needed time to solidify diplomatic and military contingencies in case his public announcement enflamed the situation with the Soviets. Three days later, in the midst of the Cuban Missile Crisis, President Kennedy sent a note to *The New York Times* publisher thanking him for his forbearance.

As it did during the Cuban Missile Crisis, the press has continued to be mindful that its responsibility to the nation is not to pass along every bit of classified information it receives, but to weigh carefully the public's right to know what its government is doing against the national security harms that might result from publication. Indeed, Benjamin Bradlee noted in his memoir *A Good Life* that while he was editor at *The Washington Post*, "I kept many stories out of the paper because I felt – without any government pressure – that the national security would be harmed by their publication."

This past weekend Attorney General Gonzales indicated on ABC's news program "This Week" that the Department of Justice is considering the possibility of bringing criminal prosecutions against reporters who publish classified information. Rather than threaten reporters with jail time, the Executive branch should follow the lead of President Kennedy and continue its efforts to explain to the press why certain information must be kept secret. Leaks are inevitable, but the press is not obligated to publish the contents of every leak it receives. That the press has demonstrated a willingness to discuss its publication decisions with the Executive branch should be applauded and encouraged. But the government cannot expect the press to withhold publication when government officials provide nothing more than vague and generalized reasons to justify continued secrecy. In such cases, the press has every reason to suspect that publishing the information in question would not in fact harm national security and would instead serve the public interest.